

Case Number: 1801044/2014

1802149/2017

1802390/2018

1802391/2018

1802392/2018



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Dolphin

v

The Brunswick Centre

Heard at: Leeds

On: 24 and 25 July 2018

Before:

Employment Judge Cox

Appearances:

For the Claimant:

In person

For the Respondent:

Mr J Searle, counsel

JUDGMENT AT PRELIMINARY HEARING

1. The following claims are dismissed on withdrawal by the Claimant:

1.1 the allegations of unfair dismissal for trade union reasons in Claim no. 1802149/2017 and 1802392/2018

1.2 any allegations of detriment on trade union grounds in Claim nos. 1802149/2017 and 1802390/2018

1.3 any allegation of sexual orientation discrimination in Claim no. 1801044/2014

1.4 any allegation of public interest disclosure detriment during employment in Claim nos. 1802149/2017 and 1802390/2018

- 1.5 any allegations of unfair dismissal for public interest disclosure detriment during employment in Claim nos. 1802149/2017, 1802390/2018 and 1802392/2018
2. The allegations of post-employment public interest disclosure detriments in Claim nos. 1802149/2017 and 1802390/2018 are dismissed as having been presented out of time.
3. The allegations of breach of contract in Claim nos. 1801044/2014, 1802149/2017 and 1802390/2018 are dismissed as having been presented out of time.
4. That part of the public interest detriment and dismissal allegations in Claim no. 1802391/2018 relating to an email from Mr McKernaghan to the Respondent's legal advisers dated 10 July 2013 is struck out on the ground that it has no reasonable prospect of success.

REASONS

1. During the course of the Preliminary Hearing the Claimant withdrew his allegations of detriment and unfair dismissal for trade union reasons and he consented to these claims being dismissed. The Claimant withdrew his claim of sexual orientation discrimination at the Preliminary Hearing on 25 July 2014 and that claim has also been dismissed. As the Claimant had included allegations of unfair dismissal and detriment during employment on grounds of public interest disclosure in his first claim (Claim no. 1802391/2018), which had been presented in time, he withdrew those allegations in his later claims and these were also dismissed.
2. The parties agreed that the first claim in which the Claimant alleged breach of contract was Claim no. 1801044/2014, presented on 7 April 2014. The parties also agreed that the Claimant's employment ended on 17 September 2013. This claim was therefore presented outside the statutory three-month time limit (see Article 7(a) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994).
3. The parties agreed that the first claim in which the Claimant alleged that he had been the subject of post-employment detriments because of a public interest disclosure was Claim no. 1802390/2018 presented on 5 November 2015. The allegations were repeated in Claim no. 1802149/2017 presented on 27 October 2017. The Claimant clarified the dates of the alleged detriments. These took place in the period from October 2013 to 10 March 2015. (The Claimant applied

for leave to amend Claim no. 1802390/2018 to include an allegation that in October 2015 Mr McKernaghan, his former line manager, had contacted the Benefits Agency to inform them that the Claimant was working whilst claiming benefits. The Tribunal refused this application for reasons given in the Order setting out that decision.) The claims were therefore presented outside the statutory three month time limit (see Section 48(3)(a) of the Employment Rights Act 1996).

4. The Tribunal therefore had to decide whether it had been reasonably practicable for these claims to have been presented in time. If it was not, then the Tribunal had to decide whether the claims had been presented within a further reasonable period (see Article 7(c) of the Extension Order, Section 111(2)(b) of the Employment Rights Act 1996). Time limits are not routinely extended: it was up to the Claimant to satisfy the Tribunal that it was not reasonably feasible for him to present his claims in time and that he had presented them within a further reasonable period.
5. Having heard evidence from the Claimant on the reasons for the timing of his claims, the Tribunal was satisfied that the Claimant is an able and intelligent man who was at all material times aware of his rights and of the three-month time limit for him to present his claims to the Tribunal. Although he presented no medical evidence to support this, the Tribunal accepted his evidence that for some months following his resignation from the Respondent's employment he was in poor mental health. He was also homeless from November 2013 to February 2014. This did not prevent him, however, from engaging in clear, detailed and coherent correspondence with the Respondent. More significantly, he was able to present three claims to the Tribunal, one in late September 2013 (which was rejected because he used the wrong claim form), one on 30 September 2013 and one on 16 December 2013. The Tribunal considers that it would have been reasonably practicable for the Claimant to include a breach of contract allegation in these claims, but he did not do so.
6. In relation to the post-termination public interest disclosure detriments, the Tribunal accepted that the evidential basis for some of these allegations may not have come into the Claimant's possession until early September 2015. This, he says, is when the Respondent provided the final instalments of documents he was entitled to receive under a subject access request he had made under the Data Protection Act. The Tribunal accepts that his request resulted in him being sent a large volume of documentation that he had to work his way through. The Tribunal was not told which particular documents were not released until September 2015, but the Tribunal was prepared to assume, without finding, that this might have made it not reasonable practicable for him to present his claim in time in relation to the allegations that were based on documentation he first saw as a result of his subject access request. These allegations were: Mr McKernaghan monitored his on-line activity from October 2013 to January 2014; in January 2014 Mr McKernaghan and Ms Sheen contacted his previous employers; Mr McKernaghan did not initially provide all

the information to which the Claimant was entitled under his subject access request; and in August 2014 Mr McKernaghan accessed his personal drop box. Even if it had not been reasonably practicable for the Claimant to present claims in relation to these allegations in time, however, the Tribunal did not accept that he had presented his claim within a further reasonable period. It was a further two months after receiving the last of the documentation before he presented a claim.

7. The remaining post-termination allegations related to events of which the Claimant was aware at the time. These allegations were: in November 2013 to January 2014 Mr Bond delayed hearing the Claimant's grievance appeal and failed to follow the Respondent's procedure in relation to it; from August 2014 Mr McKernaghan delayed in responding to the Claimant's subject access request; in September 2014 Mr McKernaghan subjected the Claimant to civil proceedings to recover documents; and in October 2014 and March 2015 Mr McKernaghan submitted affidavits to the High Court containing lies. The Tribunal heard no evidence to explain why it was not reasonably practicable for the Claimant to present a claim in relation to these allegations in time.
8. For these reasons, the Tribunal dismissed the allegations of post-employment public interest disclosure detriment and breach of contract on the ground that they had been presented outside the statutory time limit and the Tribunal therefore had no jurisdiction to deal with them.
9. During the course of the Preliminary Hearing, the Claimant clarified and agreed details of his claims of public interest disclosure detriment and dismissal. One allegation he made related to an email dated 10 July 2013 between Mr McKernaghan and a solicitor working for the Respondent's legal advisers. This related to legal advice and also mentioned the possibility of the Claimant bring a Tribunal claim. The Tribunal was satisfied that this email was covered by both legal advice privilege and litigation privilege and that the allegation based upon it therefore had no reasonable prospect of success. The Tribunal therefore struck out that aspect of the claim under its power in Rule 37(1)(a) of its Rules of Procedure.

Employment Judge Cox

Date: 26 July 2018